



DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No.: OST-2022-0106]

Notice of Proposed Temporary Waiver of Buy America Requirements for the Strengthening Mobility and Revolutionizing Transportation (SMART) Grants Program

ACTION: Notice; request for comments.

SUMMARY: In order to deliver projects and meaningful results while ensuring robust adoption of Buy America standards, DOT is proposing to establish a temporary public interest waiver for projects funded under the new Strengthening Mobility and Revolutionizing Transportation (SMART) Grants Program. The waiver only applies to awards made within the first year (FY 2022) of funding for the new program, for which there may be limited cases where the Buy America requirements would apply for planning and prototyping activities. Given that this program is in its first year and DOT has not yet received applications, the waiver is intended to ensure that applicants consider the broadest possible range of technologies and solutions in their proposals for funding in FY 2022. Recipients of FY 2022 funds for Stage 1 activities are to collect data that will help inform the application of Buy America requirements to the funding of implementation activities under the program and identify any current gaps in the domestic availability of products that could potentially be filled by American suppliers.

DATES: Comments must be received by October 21, 2022.

ADDRESSES: Please submit your comments to the U.S. Government electronic docket site at <http://www.regulations.gov/>, Docket: OST-2022-0106.

Note: All submissions received, including any personal information therein, will be posted without change or alteration to <http://www.regulations.gov>. For more information, you may

review DOT's complete Privacy Act Statement published in the Federal Register on April 11, 2000 (65 FR 19477).

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Darren Timothy, DOT Office of the Assistant Secretary for Transportation Policy, at darren.timothy@dot.gov or at 202-366-4051. For legal questions, please contact Michael A. Smith, DOT Office of the General Counsel, 202-366-2917, or via e-mail at michael.a.smith@dot.gov.

SUPPLEMENTARY INFORMATION:

Background

On November 15, 2021, President Biden signed the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act, [Pub. L. No. 117-58](#). Section 25005 of the BIL authorized the Department of Transportation (DOT) to establish the SMART Grants Program, and Div. J of the BIL appropriated \$500 million for that purpose for fiscal year 2022 through 2026, of which \$100 million is available for fiscal year 2022. The purpose of the SMART Grants Program is to conduct demonstration projects focused on advanced smart city or community technologies and systems in a variety of communities to improve transportation efficiency and safety. Eligible project activities under the program include Coordinated Automation; Connected Vehicles; Intelligent, Sensor-based Infrastructure; Systems Integration; Commerce Delivery and Logistics; Leveraging Use of Innovative Aviation Technology; Smart Grid; and Smart Technology Traffic Signals.

The SMART Grants Program anticipates providing two types of funding. The first is Stage 1 Planning and Prototyping Grants (Stage 1 grants) which will support recipients' efforts

in refining and prototyping their proposed projects. At the conclusion of Stage 1, recipients should have the information to either create a fully realized implementation plan with robust performance metrics or to make an informed decision not to proceed with the concept.

Eligible entities will be required to receive Stage 1 grants in order to be considered for selection for the second type of funding: Stage 2 Implementation Grants (Stage 2 grants). Stage 2 implementation projects should result in a scaled-up demonstration of the concept, integrating it with the existing transportation system and refining the concept such that it could be replicated by others. In FY 2022, DOT is only soliciting applications for Stage 1 grants. DOT anticipates that it will solicit applications for both Stage 1 and Stage 2 grants in FY 2023.

In January 2021, President Biden issued [Executive Order \(EO\) 14005](#), titled “Ensuring the Future is Made in All of America by All of America’s Workers,” launching a whole-of-government initiative to strengthen Made in America standards. The EO states that the United States Government “should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States.” DOT is committed to ensuring strong and effective Buy America implementation consistent with EO 14005, and has a long track record of successfully applying Made in America standards to support American workers and businesses through its more than \$70 billion in grant programs, and \$700 million in direct purchases in FY2020.

The BIL also includes the Build America, Buy America Act (“the Act”). Pub. L. No. 117-58, div. G 70901-52, which greatly strengthens Made in America standards by expanding the coverage and application of Buy America preferences in Federal financial assistance programs for infrastructure. The Act requires that the head of each covered Federal agency shall

ensure that “none of the funds made available for a Federal financial assistance program for infrastructure ... may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.” BIL § 70914(a).

On April 18, 2022, OMB issued memorandum [M-22-11](#), “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure” (“Implementation Guidance”). The Implementation Guidance states that, for purposes of applying the Act’s domestic preference requirements, “the term ‘infrastructure’ includes, at a minimum, the structures, facilities, and equipment for, in the United States, roads, highways, and bridges; public transportation” and other public infrastructure. The Implementation Guidance also states that “Federal agencies should interpret the term ‘infrastructure’ broadly and consider the definition provided above as illustrative and not exhaustive. When determining if a particular construction project of a type not listed in the definition above constitutes “infrastructure,” agencies should consider whether the project will serve a public function.” Implementation Guidance at p. 4.

Section 70914(b) of the Act allows the head of a Federal agency to waive the application of a Buy America preference under an infrastructure program under certain limited circumstances, including on the basis of public interest; nonavailability of domestically produced materials or products; or unreasonable cost. The Implementation Guidance notes that a “waiver in the public interest may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by the Act.” Implementation Guidance at p. 10. The guidance also recognizes several instances in which Federal agencies may consider issuing a public interest waiver.

Proposed Waiver and Request for Comments

With the goal of advancing crucial infrastructure projects in a timely manner while implementing the new Buy America requirements, DOT is considering using its authority under Section 70914(b)(1) of the Act to provide a temporary waiver of the Buy America requirement for projects funded under the SMART grants program, on the basis that applying the domestic content preference for these materials would be inconsistent with the public interest. The temporary waiver would apply only to projects' Stage 1 planning and prototyping activities awarded pursuant to the [FY 2022 Notice of Funding Opportunity](#) for the program. The Department requests comment on whether such a waiver would be warranted. The proposed waiver would not apply to any Stage 1 or Stage 2 activities funded by the SMART Grants program in subsequent fiscal years.

As noted above, in FY 2022, SMART Grants funding will only be awarded for Stage 1 Planning and Prototyping grants. While those activities will largely involve project pre-development activities that would not be subject to Buy America requirements, they may also include the permanent installation of transportation-related technologies and equipment on public roads or public transportation systems, in which case they would be considered infrastructure that is subject to the domestic preference requirements of the Act.

The purpose of this waiver is to ensure that applicants for Stage 1 funding in FY 2022 consider the broadest possible range of technologies and solutions in their proposals. During and following Stage 1, recipients will report on their projects and results, which will be shared with the broader transportation sector to document lessons learned and identify any barriers or technical limitations on further development and deployment of those solutions, as well as those technologies that might show promise. Those purposes are best served by ensuring that a variety

of technological applications can be explored in this first stage. The waiver will also ensure that recipients of FY 2022 funding are able to obligate those funds in a timely manner and commence the critical activities envisioned by Congress in its creation of this Federal assistance program.

The data collected by recipients of FY 2022 Stage 1 grant funding will also assist DOT in better understanding the nature of the types of structures and equipment that may be deployed in Stage 2 Implementation, which will assist the Department in determining how the Act's domestic preference requirements for infrastructure should be applied. Recipients will also collect and report data on the manufacturing sources of that equipment, which will help DOT and the industry identify both potential domestic suppliers for these technologies and any gaps in availability from U.S.-based sources that would provide a market opportunity for any suppliers able to meet the domestic preference requirements of the Act for iron and steel, manufactured products, and/or construction materials.

If this general applicability waiver is not issued, recipients of FY 2022 SMART Grants funding would be expected to comply with the Act in implementing their Stage 1 planning and prototyping projects. This could lead some potential applicants to limit the range of potential eligible projects that they might consider seeking funding for in FY 2022 due to an inability to determine a priori whether products procured under those projects might be subject to and compliant with the Buy America requirements of the Act, which would thus reduce the program's potential to foster innovative concepts in its inaugural year. In contrast, under the proposed waiver, applicants will be able to propose more diverse innovative concepts.

The OMB Implementation Guidance also provides that, before granting a waiver in the public interest, to the extent permitted by law, agencies shall assess whether a significant portion of any cost advantage of a foreign-sourced product is "the result of the use of dumped steel, iron,

or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products.” Implementation Guidance at p. 12. E.O. 14005 at Section 5 includes a similar requirement for “steel, iron, or manufactured goods.” However, because the public interest waiver that DOT is proposing in this notice is not based on consideration of the cost advantage of any foreign-sourced steel, iron, or manufactured product content, there is not a specific cost advantage for DOT to consider.

DOT will consider all comments received in the 15-day comment period during its consideration of the proposed waiver, as required by section 70914(c)(2) of the Act. Comments received after this period, but before any notice of a decision whether to grant a waiver is published in the Federal Register, will be considered to the extent practicable.

Issued in Washington, DC.

Polly E. Trottenberg,

Deputy Secretary.

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